successful. Early in 1967 another Government Toddy contractor was appointed and he obtained a job as a toddy tapper but he worked only for a few days as his application for a work permit was not approved. He is still unemployed. It is submitted on behalf of the plaintiff that damages should be awarded from 15th September, 1964, until the day of the hearing at $250 per month amounting to $10,698.92. I am not satisfied that the plaintiff has not worked since 15th September, 1964. How could he have supported himself, his wife and six children for 43 months? The fact that he could not get a work permit cannot be attributed to his expulsion from the union. I think he was probably unemployed for not more than six months and his loss would be at $250 per month.

In the result there will be an order in terms of prayers (1), (2) and (3) of the plaintiff's claim and damages in the sum of $1,500.

Order in terms.

Solicitors: *Mallal & Namazie; Lee & Lee.*

SEBASTIAN v. PUBLIC PROSECUTOR

[R.Cr.J. (Chang Min Tat J.) October 1, 1968]
[Ipoh — Criminal Revision No. 18 of 1968]

Penal Code s. 174 — Witness not appearing on date fixed for hearing though subpoenaed — Warrant of arrest — Witness surrendering to court — Irregular endorsement on subpoena by police personnel — Bailable offence — Conviction of witness — Whether justified.

Constitutional Law — Right to liberty.

Six persons were arrested and charged with rioting sometime in May 1967. The trial was adjourned from time to time on no less than 7 occasions when finally it was concluded. The accused was one of the persons subpoenaed as a witness at the trial of the six accused. The seventh rioter was arrested sometime in March 1968. The accused was also one of the two witnesses subpoenaed to attend court. On the day fixed for hearing the prosecution applied for an adjournment and a fresh date was fixed for hearing on August 27, 1968. When the case was called on August 27, 1968 the prosecuting officer advised the magistrate that two of the witnesses (one of whom was the accused) had failed to turn up in court. The magistrate then issued a warrant for the arrest of the accused with the further order that no bail was to be allowed. He then adjourned the case to November 13, 1968. On August 28, 1968, on hearing of the order of arrest against him, the accused went to the court to surrender himself. He was brought before the magistrate, and the magistrate told the accused to go home and await arrest. The accused was arrested on September 17, 1968 and charged with intentionally omitting to appear in court on August 27, 1968. No facts were given and no reference was made to any allegation that the facts were as in the charge. After a plea in mitigation the accused was fined $100 which was paid but he was issued a receipt under a different name. The accused asked for a reconsideration of his case by letter.

Held: (1) the record clearly showed that the magistrate had made the bailable offence under section 174 of the Penal Code a non-bailable one. The learned magistrate had no right whatsoever to deprive a subject of his constitutional right to liberty and to be tried according to law;

(2) the correct procedure where a man surrenders himself to a warrant of arrest would be to put him on bond for his appearance on the date and then release him;

(3) at the trial of the accused of the charge under section 174 of the Penal Code no facts were given and the accused was never asked to admit the facts which would establish his guilt and therefore a grave injustice was inflicted upon him in the case;

(4) the endorsement of a new date of hearing on the subpoena on August 27, 1968 by a police personnel was not a proper or effective endorsement so that in the result there had not been served on the accused a proper subpoena to enforce his presence in court on August 27, 1968 and accordingly no offence had been committed under section 174 of the Penal Code.

Case referred to:—

(1) *Teh Lee Tong* v. *R.* [1956] M.L.J. 194.

CRIMINAL REVISION.

Applicant in person.

M. Mahalingam (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J.: My attention having been drawn by a letter from the accused, I called for the record and found a comedy of errors in five acts that would have been farcical if it had not been so fraught with dire consequences.

Act I commenced with the arrest and trial of some six persons from a crowd of rioters. The offence was committed on the night of 17th March 1967, and the trial was, in what I now believe to be the usual practice in the courts here, adjourned from time to time until its final conclusion on 23rd February, 1968. There were in all seven appearances in court, in 1967 on 18th May, 25th May, 19th July, 19th September, 30th November and in 1968 on 22nd and 23rd February. Only on the last two days was evidence recorded, though on the other five days, the case was set down for hearing. Subpoenas were applied for on 6th April, 1967 to compel the attendance of witnesses, of whom the accused was one, on 18th May, 1967. From the absence of any proceedings taken either in accordance with the Criminal Procedure Code (Cap. 6) or otherwise against the accused, it must be assumed that the accused dutifully turned up in court on each of the said seven days.

Act II saw the arrest of the 7th rioter on 15th March, 1968. The case against this 7th rioter was fixed for hearing on 7th June, 1968. Subpoenas were applied for on 14th May, 1968 and one was served on the accused on 3rd June, 1968. On the day fixed for the hearing, the prosecution applied for an adjournment upon the ground that the complainant was not in court, he not having been served. A fresh date for the hearing was fixed on 27th August, 1968.

Act III was the natural sequel. It opened with one of the police constables (he might of course be of slightly higher rank) calling for the subpoenas that had been served on the several witnesses and himself writing on the face of the subpoenas the words "PP. 27/8/67 (H)" in red ink before returning them to the witnesses.

In Act IV Scene I the case was called on 27th August, 1968. The prosecuting officer, one inspector Harcharan Singh, advised the magistrate that two witnesses had failed to turn up in court. They were (1) John Selvaraj, and (2) M. Sebastian, the accused. They had, according to the prosecuting officer, been served on 3rd June, 1968. The record is silent on the matter but it must be presumed that the police asked for the issue of warrants of arrest against the two named missing witnesses. The magistrate made the necessary order, with the further edict that no bail was to be allowed. He then adjourned the hearing of the case to the 13th November, 1968.

There was a brief interlude in Act IV Scene II. On the next day, 28th August, 1968, on learning of the order for the issue of a warrant of arrest against him, the accused went to the court to surrender himself. He was brought before the magistrate and since the warrant was not cancelled and the accused put to bail (it would of course be going against his own order), it would appear that the magistrate told the accused to go home and await arrest.

Act V was the denouement where as in all well-written plays, justice was done before the curtain rang down. The accused was duly brought before the magistrate under the warrant of arrest. When he was arrested was not clear on the record but I have since ascertained it was on 17th September, 1968. The charge was read over and explained to him. He was alleged to express himself to be able to understand the nature and consequences of his plea and he pleaded guilty to the charge. The charge sheet contained a charge to the effect that being legally bound to appear in court on 27th August, 1968 by a summons duly served on him he intentionally omitted to do so. It also bore the legend "No bail allowed. To produce in court immediately on arrest". No facts were given and no reference was made to any allegation that the facts were as in the charge. After a plea in mitigation the accused was fined $100. It was paid.

If it was a straightforward case of a witness intentionally failing to attend court, there was really no reason for him to complain if he should be punished for his absence. But it was not a straightforward case. Having paid the fine, the accused was issued with a receipt to him under a different name, that of the other missing witness, John Selvaraj. Not unnaturally therefore the accused must now feel that he might have to face the music again and pay another fine on the same matter. He asked for reconsideration of his case and in due course the record was brought before me.

The record clearly showed that the learned magistrate had made the bailable offence under section 174 of the Penal Code a non-bailable one. Not being a law-making authority, the learned magistrate had of course no right whatsoever to deprive a subject of his constitutional right to liberty and to be tried according to the law. Suffice it to say that I am assured that the learned magistrate is now aware of his error. I am also assured that the learned magistrate is also aware that the correct and proper procedure where a man surrenders himself to a warrant of arrest would be to put him on a bond for his appearance on the due date and then release him.

The record however disclosed a more fundamental and a more serious error. At the trial of the accused of the charge under section 174 of the Penal Code no facts were given and the accused was never asked to admit the facts which would establish his guilt. If the normal procedure had been followed, I feel sure that the grave injustice that was inflicted in this case would not have been committed. The mind of the prosecuting officer in the first place and in the second, the mind of the learned magistrate would have been directed to the question whether a proper subpoena had been issued, or if a proper subpoena had been issued, whether it was duly and in accordance with the law endorsed with the new date of hearing and whether it had then been properly re-served on the accused. It is of course elementary that failing the issue of a proper subpoena or a proper subpoena duly endorsed and served, no offence under section 174 of the Penal Code would have been committed.

In my view, on the facts on the record, the subpoena that was served on the accused on 3rd June, 1968 was a valid one for attendance in court on 7th June, 1968 and equally clear the endorsement thereon of the new date of hearing on 27th August, 1968 by a police personnel was not a proper or effective endorsement so that in the result there had not been served on the accused a proper subpoena to enforce his presence in court on 27th August, 1968.

It appears however that the endorsement of subpoenas by members of the police force in attendance in court was the regular practice in the magistrates courts at least in Ipoh. It was not happily, the practice in the sessions court in Ipoh. There the practice was, if it was not intended to apply for fresh subpoenas, to endorse on the subpoenas that had been issued with the new date of hearing under the hand of the registrar and the seal of the court before re-

service on the witnesses. How it came about that two courts that sat in the same building and shared a common registry should adopt two different procedures passes my comprehension. I will however for the moment content myself with saying that the practice in the magistrates courts was wholly wrong and ineffective. The power to issue process of subordinate courts is conferred by section 5 of the Courts Ordinance 1948 on presidents of sessions courts, magistrates and registrars of sessions courts and there is no authority that had been conferred at any time to delegate such powers to police officers however high their ranks. The subpoena served on the accused on 3rd June, 1968 and amended by the police officer on 7th June, 1968 was therefore not a proper process compelling the accused to attend court on 27th August, 1968 and failure to so attend was accordingly not an offence under section 174 of the Penal Code or of any other section.

The learned deputy public prosecutor had quite rightly not sought to uphold the conviction. The conviction is accordingly set aside and the fine which had been paid is to be refunded.

I must now deal with the other complaint in the accused's letter though it is not strictly relevant to this revision. In his letter, the accused had claimed that the part he played in the affair was merely at the request of his employer to drive the complainant who had been wounded in the riot and who had run to his employer's house for shelter, to the hospital. I have ascertained from the learned deputy public prosecutor that the accused's version is substantially true except for one omission that he brought the complainant to the police station before taking him to the hospital. Quite clearly the accused was right in claiming that he was not a material witness and should never have been brought to the court at such inconvenience to him and at some expense to the Government since his fees as a prosecution witness would have to be paid. It seems to me that officers will do well to remember that they can be surcharged for wasteful and unnecessary expenses incurred by them on Government's behalf. It is however, as I do recognise, a matter for the police to decide whether a witness is material, but it would appear that in this particular instance no decision was made and a subpoena was applied for as a matter of course and the witness made to appear throughout the protracted hearing even though it was realised at some subsequent stage that his evidence would assist neither the prosecution nor the defence since the accused was neither called in point of fact as a witness for the prosecution nor offered to the defence. In these circumstances, the accused's complaint that he was unnecessarily brought to court and the further allegations that he was sneered at by some in the court and even by the police became relevant.

There is of course no reward for civic-mindedness other than a self-satisfaction of having done one's duty but surely the administration of justice and the prosecution of crimes should not be carried out in such a way as to earn the derision of the public and to deter members of the public from coming forward as witnesses. But this will inevitably happen unless the prosecution re-examines its practice and pays some reasonable if only minimal regard for the convenience of the public.

In this connection, investigating and prosecuting officers will do well to acquaint themselves with and remember the decision of Spenser-Wilkinson J. (as he then was) on the question of the calling of witnesses in the case of *Teh Lee Tong* v. *R.*[1] There the learned judge had expressed the opinion *inter alia* that witnesses who were not material to the prosecution or to the defence need not be called even though statements had been recorded from them.

In the circumstances of the case, I cannot with regret absolve the members of the police force concerned with it from all blame. Surely it is their duty to acquire for themselves some knowledge of the law of crimes and procedure, in this instance, to ensure that there had been a proper service of a summons duly served on the accused before applying for a warrant of arrest. It is regrettable that the prosecuting officer had not taken steps to be certain of the procedure adopted but this apart, he had misled the court, because when the prosecuting officer told the magistrate that there were two missing witnesses, that was in point of fact a lie. There was, in fact, a third missing witness, a doctor, who from the nature of the evidence was a much more material witness. As it turned out it was fortunate that no illegal warrant was applied for to arrest the doctor but the point that I want to make is this that prosecuting officers should not mislead the court and should not arrogate to themselves the power to decide whether they would proceed against one person and not against another when the same offence would appear to have been committed by both of them. There is the constitutional guarantee of equality before the law and for myself I should have thought that the persons whom one would expect to be among the foremost upholders of the Constitution would be the police.

Order accordingly.